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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO JIMENEZ,

Defendant and Appellant.

B283211

(Los Angeles County
Super. Ct. No. NA103252)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed and remanded with directions.

William L. Heyman, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Alejandro Jimenez was convicted of two crimes committed on November 20, 2015, and a third offense committed on December 26, 2015. Counts 1 and 3 involved a shooting on the earlier date. Charged with attempted murder in count 1, appellant was convicted of the lesser included offense of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)).¹ On this count, the jury found great bodily injury and firearm enhancements to be true, but not the alleged gang enhancement. In count 3, the jury convicted appellant, as charged, of assault with a firearm (§ 245, subd. (a)(2)) and found the firearm allegation to be true. Count 2 stemmed from events occurring on the following month. Appellant was charged with fleeing a police officer's pursuing vehicle and convicted of the lesser included offense of evading a peace officer with wanton disregard for safety (§§ 2800.1, subd. (a); 2800.2). In a bifurcated trial, the allegations that appellant served two prior prison terms and had three prior strike convictions were found to be true. The trial court denied appellant's *Romero* motion² and imposed an aggregate sentence of 37 years to life.³

¹ All undesignated statutory citations are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

³ On count 1, appellant was sentenced to 25 years to life, plus an additional 12 years, comprised of consecutive terms for a prior serious felony conviction, prior prison term, firearm use, and great bodily injury. The same sentence was imposed, but stayed, as to count 3. Appellant was sentenced to a concurrent seven-year term on count 2.

On appeal, Jimenez argues the prosecution failed to prove he did not act in self-defense, contends the trial court abused its discretion in denying his *Romero* motion, asserts his sentence constitutes cruel and unusual punishment, and claims ineffective assistance of counsel. We affirm, but remand the matter for a new sentencing hearing to permit the trial court to exercise its discretion to dismiss or strike the firearm and prior serious felony enhancements. (§§ 667; 12022.5, subd. (c); 1385.)

FACTUAL AND PROCEDURAL OVERVIEW

A. *November 20, 2015 Shooting*

At approximately midnight on November 20, 2015, Officer Sterling Byrd of the Los Angeles Police Department (LAPD) responded to a report of “armed with a deadly weapon” at a 24-hour gas station located at 227th Street and Western Avenue in Torrance. No victim or suspect was present when he arrived. Officer Byrd saw a gunshot hole in a rear wall of the gas station and blood next to it. Near one of the pumps, he saw two additional gunshot holes, and three nine-millimeter casings. He found one spent round, but could not determine whether it came from a nine-millimeter or .45 caliber casing.

The gas station cashier told Officer Byrd she was assisting a female customer at the window when a Hispanic man walked up with a skateboard and slammed it on the ground. A male Hispanic at the pumps pointed a gun and yelled, “[Expletive] that, I’m gonna get that [expletive],” and fired three or four shots in the direction of the pumps. The cashier dropped to the ground and heard three more shots, possibly from another gun.

Officer Rene Avila and her partner also responded. Checking with local hospitals, Avila learned a gunshot patient

was being treated at Harbor UCLA Medical Center. She and her partner went there and met the victim, Fernando Lozano. He had been shot in the left arm. Lozano was uncooperative and did not respond to any of her questions.

The gas station was equipped with more than a dozen motion-activated security cameras that recorded to a DVR. LAPD Detective Brian Williams, then a gang detective, created a video of screen shots from the surveillance videos. Detective Williams testified as the soundless video was played for the jury. The video depicted the victim's light-colored sedan arrive first and pull up to a pump on the second row, farthest from the cashier's window; the passenger side was next to a pump. Appellant's blue SUV pulled through the lane adjacent to the cashier's window and turned around, parking in the lane between the two rows of pumps, with the driver's side next to a pump.

The victim walked toward the cashier's window. Appellant looked to the rear of his vehicle and also walked to the cashier's window. A woman was already there. Appellant appeared to be holding a firearm, but the victim's hands were empty. The two men appeared to exchange words.

Appellant came back into view, crouched by the hood, and appeared to fire a gun toward the victim's car. Appellant drove away. The victim returned to his car and drove off.

Although the video did not show the license plate of the SUV, Officer Williams believed the vehicle belonged to appellant based upon previous photographs he had seen of appellant's car. Officer Williams testified appellant and the victim, Fernando Lozano, were from rival gangs. Appellant belonged to the East Side Torrance gang, and Lozano was a member of the Harbor City Boys gang.

The prosecution called Lozano as a witness. Other than stating his name, Lozano refused to answer any questions and repeatedly insisted, “I don’t know nothing.” The cashier could not be located at the time of trial, and Officer Byrd testified as to her interview statements.

Officer Byrd also viewed the surveillance videos/screen shots. He did not see a skateboard in the hands of the victim and did not see one of the men point a gun at the gas pumps.

On December 15 or 16, 2015, Detective Williams executed a search warrant for a residence in Torrance. The officer located an SUV in the garage; the VIN number matched the SUV registered to appellant. The vehicle had paper plates on it, and the rear windshield was shattered. Officers left the vehicle in the garage and monitored the house in an attempt to locate appellant.

B. December 26, 2015 High-Speed Car Chase

At approximately 9:45 p.m. on December 26, 2015, LAPD Officer Jose Arranaga and his partner, assigned to the gang enforcement detail of Harbor Division, were on patrol, in uniform, and in a marked police vehicle. Officer Arranaga noticed a familiar blue Ford SUV near 221st Street and Harvard in Torrance. The officer had stopped appellant three to four times before, and he recognized the SUV as belonging to appellant. The car usually had license plates on it, but this time, it displayed “paper plates.”

Officer Arranaga, aware appellant was wanted in connection with an attempted murder, reported the sighting. He turned on the police car’s overhead lights, which activated the patrol car’s front-facing video camera. Appellant sped away as

soon as Officer Arranaga turned on the overhead lights.

Arranaga gave pursuit, and the entire chase was recorded.

The pursuit video was played without sound for the jury. Appellant made numerous Vehicle Code violations during the chase, which traversed streets and included a stretch on the southbound 110 freeway, where speeds reached 100 miles per hour. The pursuit ended after appellant exited the freeway, crashed into a curb, and hit a building. Appellant was taken into custody.

Appellant's passenger, Amanda Garcia, was injured and needed medical attention. LAPD Officer Blake Putnins interviewed Garcia at the hospital. She was dating appellant. When the police car turned its lights on behind them, appellant said it was "too late" and drove away.

C. Gang Evidence

Count 1 included an allegation that appellant shot Lozano for the benefit of, at the direction of, or in association with a criminal street gang. Both the prosecution and defense presented gang expert testimony.

Testifying for the prosecution, Officer Arranaga opined appellant was a member of the East Side Torrance gang. Lozano was a member of the Harbor City Boys; his moniker was "Little Creeper." The officer outlined the geographical boundaries of each gang's territory and testified concerning gang culture. Harbor City Boys were rivals of East Side Torrance.

Appellant presented the testimony of gang expert Martin Flores. Flores spoke with appellant and some of his family members. Flores formed the opinion appellant had not been an active member of the East Side Torrance gang for at least 10

years. Based on a hypothetical that mirrored the facts of the case, Flores opined appellant was not acting for the benefit of his gang when he shot Lozano.

In closing argument, defense counsel said the gang expert testimony supported a self-defense theory. Defense counsel asserted appellant, a former gang member, was always on the alert. Lozano had prior convictions for firearm possession and carjacking. The gas station was outside the Harbor City Boys territory. Lozano's presence meant he was there "to put in some work." Lozano parked his car at the pump mostly out of the view of the station's security cameras. Lozano approached the cashier's window with both hands in his pockets. Lozano, not appellant, was waiting with premeditation. When appellant encountered Lozano at the cashier's window, appellant believed he was in imminent danger of bodily harm. Appellant ducked behind his car to fire the shots at Lozano only after Lozano fired first. Lozano lied about the shooting because Lozano was the aggressor in the incident.

DISCUSSION

A. Evidence that Appellant Did Not Act in Self-Defense Was Sufficient to Find Him Guilty Beyond a Reasonable Doubt

Appellant asserts the gas station shooting was an act of self-defense. He argues reversal of counts 1 and 3 is compelled because the evidence is insufficient to establish he failed to act in self-defense. We hold otherwise.

To assess the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment. We affirm if there is substantial evidence, i.e., credible evidence of

solid value, from which a reasonable trier of fact could find the appellant guilty beyond a reasonable doubt. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) Reversal is warranted only if “it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Self-defense is appropriate where a defendant (1) reasonably believes he is in danger of suffering bodily injury; (2) reasonably believes the immediate use of force is necessary to defend against that danger; and (3) uses no more force than reasonably necessary to defend against the danger. (CALCRIM No. 3470; *People v. Clark* (2011) 201 Cal.App.4th 235, 250 (*Clark*).) Self-defense is a complete defense to the charged crimes of attempted murder and assault. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082; *Clark, supra*, at p. 250.) To justify acting in self-defense, a defendant generally must have an actual, honest, and reasonable belief that bodily injury is about to be inflicted on him. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064 (*Minifie*).)

Additionally, the right of self-defense is limited to the use of reasonable force. (*Minifie, supra*, 13 Cal.4th at pp. 1064-1065; *Clark, supra*, 201 Cal.App.4th at p. 250.) A defendant’s use of force must be proportionate to the threat, and the use of excessive force destroys the justification of self-defense. (See *People v. Hardin* (2000) 85 Cal.App.4th 625, 629.) The right to use force continues only while the danger exists or reasonably appears to exist. (*Clark, supra*, at p. 250.) The prosecution bears the burden “to prove beyond a reasonable doubt that the defendant

did not act in self-defense.”⁴ (*People v. Martin* (1980) 101 Cal.App.3d 1000, 1011, italics omitted.)

To support self-defense, appellant relies on the cashier’s statement to Officer Byrd that she saw a man (presumably Lozano) point a gun at the gas pumps and threaten to “get that [expletive]” and her belief that she heard shots from two weapons. Appellant dismisses the somewhat inconsistent evidence that only three nine-millimeter casings were recovered, suggesting Lozano may have picked up his shell casings. Appellant opines his own act of repositioning his car beside the gas pump may well have been nothing more than a means to facilitate an easier exit.

These inferences do not detract from the substantial evidence that appellant did not act in self-defense. The surveillance video does not show Lozano with a skateboard or a gun, but depicts appellant firing his weapon across the hood of his SUV in the direction of Lozano and Lozano’s vehicle, which was partially obscured by the second row of gasoline pumps. Nothing in the video suggests appellant was returning gunfire.

⁴ Appellant’s jury was so instructed. (CALCRIM Nos. 604, 874, 3470.)

CALCRIM No. 604 provides in part, “The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of attempted murder.”

CALCRIM No. 875 is in accord, advising the prosecution has the burden to prove “[t]he defendant did not act (in self-defense.)”

CALCRIM No. 3470 reiterates, “The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense.”

To the contrary, appellant's firing appeared to be an attack from the relative protection and safety of his SUV. This evidence was substantial and sufficient to prove appellant's guilt beyond a reasonable doubt. The prosecution met its burden as to counts 1 and 3.

B. Appellant's Romero Motion

1. Background

Appellant's three previous strike convictions stemmed from one 2008 incident involving three robbery victims.⁵ For those crimes, the trial court sentenced him to the low term of two years on Count 1, to be served concurrently with the sentence on the other two counts. Appellant was paroled in May 2010, but violated his parole by committing a second-degree burglary and petty theft. He pleaded guilty to those offenses in January 2011, and received a three-year sentence. Appellant was paroled a second time in March 2012. Sometime after this parole, he was convicted of domestic violence and driving on a suspended license.

Appellant asked the trial court to strike all three prior strike convictions, arguing they were old and involved one incident of criminal conduct. With respect to the current convictions, defense counsel maintained appellant used a firearm against an aggressor in self-defense, but did concede the high-speed chase was "reprehensible."

The motion and argument also highlighted appellant's personal history. His grew up, and his family still lived, in the

⁵ We granted appellant's request for judicial notice of the reporter's transcript of the March 3, 018 hearing where he pleaded no contest to three counts of robbery.

neighborhood where the gas station is located. Appellant dropped out of high school after numerous assaults by the Harbor City Boys and joined the East Side Torrance gang. Appellant left the gang soon after joining and worked various jobs to support his growing family. As the father of three young boys, appellant was active in his family life; the defense provided the trial court with photographs of appellant's children.

The prosecution opposed the *Romero* motion, arguing the robbery convictions were not remote and appellant had been in prison for several years between convictions. The prosecutor also noted this was not a case where a defendant had multiple strike convictions against the same victim in the same incident; his 2008 robbery convictions involved three victims.

Appellant spoke on his own behalf. He had abused drugs since age 17. He admitted his conduct in committing the prior crimes; however, he did not intend to hurt anyone and did not use weapons. His wife left him shortly before the gas station shooting. He had three sons at home and wanted to "finish raising them to men."

The trial court considered the trial evidence, the statements in the motion, and the factors discussed in *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*): "Having considered those factors, I'm not willing to grant the *Romero* motion and I will not strike the strikes."

2. Analysis

The Three Strikes law "was intended to restrict courts' discretion in sentencing repeat offenders" (*Romero, supra*, 13 Cal.4th at p. 528), and "the law creates a strong presumption that any sentence that conforms [to it] is both rational and proper."

(*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).)
However, the Supreme Court has recognized there may be peculiar circumstances that render application of the Three Strikes sentencing formula “arbitrary, capricious or patently absurd.” (*Ibid.*, quoting *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) In those limited circumstances, a trial court’s refusal to strike prior strikes constitutes an abuse of discretion. (*Carmony, supra*, at p. 374.)

The Supreme Court explained the “fundamental precepts” that guide our review: “First, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” [Citations.] Second, a “decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 376–377.)

On appeal, we “must consider whether, in light of the nature and circumstances of [appellant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent

felonies.” (*Williams, supra*, 17 Cal.4th at p. 161.) The circumstances must be “extraordinary” for a criminal with multiple strike convictions to be deemed to fall outside the spirit of the Three Strikes sentencing scheme. (*Carmony, supra*, 33 Cal.4th at p. 378.)

We find no extraordinary circumstances here. The prior strike convictions were not remote, particularly when one considers appellant’s intervening incarceration and additional criminal conduct he committed before the current offenses. (See, e.g., *People v. Philpott* (2004) 122 Cal.App.4th 893, 906.) Appellant’s sentences for the earlier crimes reflected the nature of those offenses, rather than appellant’s status as a recidivist offender.

As to the current offenses, appellant, a convicted felon, was carrying a firearm on the night of the shooting. He discharged the weapon at an individual standing behind gasoline pumps, even though bystanders were nearby. He then led the police on a high-speed vehicle chase, executing dangerous maneuvers and putting more bystanders at risk. The crash injured his own girlfriend. Appellant did not address his prospects, other than noting his wife left him and he was the father of three children. We find no abuse of discretion.

3. *Ineffective Assistance of Counsel – Romero Motion*

Appellant argues trial counsel was ineffective because counsel did not present the trial court with the option of striking two of the strikes, rather than three, and did not “forcefully” argue the mitigating circumstance that the strikes were all committed on the same day.

The right to effective assistance of counsel derives from the Sixth Amendment. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688; see also Cal. Const., art. I, § 15.) To demonstrate ineffective assistance, appellant must show (1) "counsel's performance was deficient when measured against the standard of a reasonably competent attorney" and (2) the prejudice resulting from counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*People v. Mayfield* (1997) 14 Cal.4th 668, 784, disapproved on another point in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) Prejudice is shown where it is reasonably probable that, but for counsel's errors, a defendant would have obtained a more favorable result. (*In re Harris* (1993) 5 Cal.4th 813, 833.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) Further, a claim of ineffective assistance of counsel is reviewed "on direct appeal [only] where 'there simply could be no satisfactory explanation' for trial counsel's action or inaction. [Citation.]" (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1.) A defendant's conviction is reversed on appeal for ineffective assistance of counsel only if the appellate record "affirmatively discloses that counsel had no rational tactical purpose for his act or omission. In all other cases the conviction will be affirmed and the defendant relegated to habeas corpus proceedings." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.)

Trial counsel was not ineffective on either point appellant argues. Defense counsel submitted a written *Romero* motion and

presented oral argument at the hearing; appellant himself addressed the court.

Contrary to appellant's assertions, his trial counsel did not present the trial court with an "all or nothing" argument. In any event, trial courts need not be provided with options in order to strike one or more prior strike convictions in furtherance of justice pursuant to section 1385. Trial courts have the authority to strike prior strike convictions on their own initiative. (*Romero, supra*, 13 Cal.4th at p. 504.)

On appeal, appellant asserts trial counsel should have stressed the fact that the three strikes arose out of the same incident. Appellant appears to argue that because the trial court did not strike any of his prior strike convictions, trial counsel's argument must not have been forceful enough and his representation, therefore, must have been ineffective. But defense counsel's opening salvo in his argument to the trial court was that appellant's strikes were all the result of a single day's criminal activity. The failure of the argument does not mean trial counsel's representation was ineffective.

C. Cruel and Unusual Punishment

Appellant seeks a reduction in his sentence on the basis it constitutes cruel and unusual punishment under both the United States and California Constitutions. Appellant asserts the 37-years-to-life sentence is grossly disproportionate as applied to his crimes and to him and as compared to more serious crimes committed in California, such as premeditated murder without a special circumstance, which would result in a sentence of 26 years to life. Appellant adds he will receive no worktime credit

as a three-strike inmate and will be close to 60 years old by the time he is eligible for parole.

Appellant forfeited this sentencing issue by failing to object in the trial court on constitutional grounds. (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247.) Were the argument not forfeited, it nonetheless would fail on the merits.

The Eighth Amendment of the United States Constitution prohibits the infliction of cruel and unusual punishment and applies to the states. (*People v. Caballero* (2012) 55 Cal.4th 262, 265, fn. 1.) The California Constitution, on the other hand, prohibits cruel or unusual punishment. (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.) Moreover, punishment that is neither cruel nor unusual “in its method [violates the California Constitution if] it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 425 (*Lynch*); Cal. Const., art. I, § 17.)

Our review begins with a proportionality analysis. (*Ewing v. California* (2003) 538 U.S. 11, 20 (*Ewing*).) The Eighth Amendment “contains a ‘narrow proportionality principle,’ that ‘does not require strict proportionality between crime and sentence’ but rather ‘forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.’” (*Graham v. Florida* (2010) 560 U.S. 48, 59–60.) “[O]nly in the ‘exceedingly rare’ and ‘extreme’ case” will a sentence be grossly disproportionate to the crime. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.) This is particularly so in noncapital cases. (*Ewing, supra*, 538 U.S. at pp. 19-20 [the defendant’s sentence of 25 years to life for felony theft of golf clubs under the Three Strikes Law (prior robbery and burglary felonies) did not violate Eighth Amendment].)

In *Lynch, supra*, 8 Cal.3d 410, the California Supreme Court identified three criteria to consider in a proportionality analysis. They are “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society;” a comparison of the sentence to “punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious;” and a comparison of the sentence “with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision.” (*Id.* at pp. 425–427, italics omitted.) Most proportionality challenges falter on the first criterion, and appellant’s arguments present no exception. (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1088 [“it is only in the rare case” that a reviewing court considers the other two criteria.]

Appellant asserts his crimes have not been egregious and have not has caused serious injury to victims. Yet he repeatedly commits offenses against persons. Although young, he is a recidivist; on the night of the gas station shooting, he was carrying a firearm. The escalation of appellant’s criminal conduct and the public danger inherent in the current offenses justify imposition of the harsher sentence. Appellant’s sentence is not disproportionate to the offenses committed. It does not shock the conscience.

D. Remand for a Limited Sentencing Hearing

When the trial court imposed the consecutive three-year enhancement for appellant’s personal and intentional discharge of a firearm (§ 12022.5, subd. (a)) and five-year enhancement for a prior serious felony conviction (§ 667, subd. (a)(1)), it did not have the discretion to strike or dismiss either sentence. Effective

January 1, 2018, trial courts were given the discretion to strike section 12022.5 firearm use enhancements “in the interest of justice.” (§ 12022.5, subd. (c).) Effective January 1, 2019, the Legislature eliminated the prohibition against striking any prior serious felony conviction enhancement. (§ 1385, subd. (b).)

In a supplemental brief, appellant argues the matter must be remanded to permit the trial court to determine whether to exercise its now-authorized discretion to strike the sentences for the firearm use and prior serious felony enhancements. The Attorney General agrees remand for this limited purpose is appropriate. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

DISPOSITION

The judgment is affirmed. The matter is remanded to permit the trial court to consider whether to exercise its discretion in furtherance of justice to strike the enhancements imposed pursuant to sections 667/1385 and 12022.5, subdivision (a).

DUNNING, J.*

We concur:

WILLHITE, Acting P. J.

COLLINS, J.

*Retired judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.